In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 261

ESTATE OF WINFRED S. HURST, DECEASED:

HARRY J. ALKER, JR., PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case arises out of a proceeding in the Pennsylvania Orphans' Court to charge the share of petitioner Alker in the Hurst estate with the additional federal estate taxes that were imposed upon the estate under Section 3612(d)(2) of the Internal Revenue Code of 1939[1] because of fraud committed by

[1] Section 3612(d)(2) reads as follows:

SEC. 3612. RETURNS EXECUTED BY COMMISSIONER OR COLLECTOR.

* * * * * *

(d) *Additions to Tax.*—

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(2) *Fraud.*—In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

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(26 U.S.C. 1952 ed., Sec. 3612)

698-619—63

Alker, the original executor of the estate, in filing the estate tax return.

Hurst died on November 7, 1949. Alker was a residuary legatee and also the original executor of the estate. In February 1951, Alker filed the estate tax return and paid a tax of $112,723.10. The Commissioner, however, challenged the valuation of the assets and asserted a deficiency. Alker, as executor of the estate, filed a petition for redetermination in the Tax Court,[2] so that no final determination of the estate's tax liability had been made by June 22, 1955, when the first adjudication of interests in the estate was made in the Orphans' Court. This adjudication dealt with many problems which had arisen during Alker's administration, including extensive surcharges against him. It was followed on August 17, 1955, by a settlement agreement which was incorporated into a supplemental adjudication by the Orphans' Court which among other dispositions, awarded to Alker as residuary legatee certain shares of corporate stock owned by the estate. The award was made expressly subject to the payment of such "additional Federal Estate Taxes * * * as may properly be found to be due * * *." (Pet. App. 4a, 5a.) The stock was not delivered to Alker, but was placed in escrow.

On March 8, 1956, Alker was indicted for attempting to evade and defeat federal estate taxes, by omitting estate assets on the return. He was removed as

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[2] These proceedings, referred to in the petition as Tax Court Docket No. 52266 (Pet. 5), show that a deficiency tax of $17,292.23 was assessed against the estate by notice of December 23, 1953.

executor about two months later and was succeeded by two individuals, Pullinger and Sitler, as administrators d.b.n.c.t.a., who, upon petition of the estate, on May 21, 1956, were substituted for Alker in the Tax Court proceedings. Alker was convicted of tax fraud and his conviction was affirmed. *United States* v. *Alker*, 255 F. 2d 851 (C.A. 3), certiorari denied, 358 U.S. 817, rehearing denied, 359 U.S. 950. Following the conviction, the government amended its answer in the Tax Court proceedings to assert against the estate an addition to the tax of about $56,000, based on the same fraudulent acts involved in the criminal case. After protracted negotiations with the estate administrators, the government agreed to accept one-half of the amount of the claimed penalty, or $28,180.78, which was, by stipulation in the Tax Court proceedings, assessed as a deficiency. The deficiency was paid by the estate and other distributees who then, represented by the administrators, brought the instant proceeding in the Orphans' Court to collect the amount of the deficiency from Alker's share of the estate, represented by the award of the stock held in escrow.

In the meantime, on July 11 and 12, 1957, the government had levied on any property interests Alker had in the estate, to cover income taxes due from him on other transactions. (Pet. App. 6a.)

The Orphans' Court held (Pet. App. 6a–8a) that Alker's action was "the sole substantial cause of" the tax penalty, and that the amount thereof was therefore, under Pennsylvania law, properly apportioned

to his share in the estate, by application of the equitable doctrine of contribution underlying the Pennsylvania statutes on estate tax apportionment which were not directly applicable.[3] It rejected Alker's contention that he was not bound by the tax settlement because he was not a party to it; and also held that Alker's interest in the estate was subject to the apportionment of any tax liabilities and that therefore there was nothing due to Alker from the estate to which the federal tax lien for his income taxes could attach. (Pet. App. 9a–10a.) The Orphans' Court decision was affirmed *per curiam* by the Pennsylvania Supreme Court. (Pet. App. 1a.)

Alker makes two contentions here: (1) that he cannot, as a matter of due process of law, be held personally liable for the addition to the tax since, although he was given a hearing in the Orphans' Court on his liability under state law to those who paid the addition to the tax, he was not a party to the Tax Court proceedings in which the addition was assessed; and (2) that the additions for fraud provided by Section 3612(d)(2) of the Internal Revenue Code of 1939 are only applicable to excise taxes, and not to estate taxes.

While the government has not sought review of the portion of the decision below adverse to it, it is concerned about Alker's arguments since his first

[3] The Pennsylvania Estate Tax Apportionment Act of 1951, which did include penalties, was, however, only applicable to returns filed after August 24, 1951 (the return here was filed February 4, 1951), and the 1937 Act did not deal with apportionment of penalties. (Pet. App. 6a.)

point would result in making an executor who is personally liable for estate tax fraud, a necessary party to any proceedings to collect additions for fraud against the estate or other persons liable for the estate tax. On his theory, those who paid the tax could not secure any contribution from him either in equity or under estate tax apportionment statutes unless he had been a party to the federal tax collection proceedings. The second point would nullify the estate tax fraud penalty.

1. Joint and several liability for the estate tax is imposed by statute upon the estate itself, executors, administrators or other persons in control of the estate, and distributees of the estate. Internal Revenue Code of 1939, Sections 822(b), 826–827. (Internal Revenue Code of 1954, Sections 2002, 6324(a).) See Lowndes-Kramer, *Federal Estate and Gift Taxes* (2d ed.), Section 21.20. The government is entitled to collect the tax from any one of these parties alone, without joinder of the others (*Phillips* v. *Commissioner*, 283 U.S. 589), and Alker was therefore not a necessary party to the Tax Court case. The fact that Pennsylvania subsequently imposed a liability upon Alker as a result of the determination in the Tax Court proceeding neither made him a necessary party thereto nor made the proceeding any less valid an adjudication as between the United States and the estate. The United States takes no position on whether Pennsylvania denied Alker due process of law because of the effect which it gave in its probate proceeding to the determination in the Tax Court proceeding.

2. Alker's argument that Section 3612(d) of the 1939 Code is confined to excise tax returns ignores the fact that Section 3612(d) is a general provision relating to returns which is expressly made applicable to estate tax returns by Sections 821(e) and 894(a) of the 1939 Code.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH KOVNER,
Attorney.

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